"1. *CONTAINER RENTAL CHARGES*

It was agreed that your clients would sort out with K.C. Dat, their forwarding agent, as to the whereabouts of the Container and to produce the relevant receipt for the return of the Container. If the Container had not been returned, it was agreed that your clients would be responsible for paying all charges of the Container Company, Container Transport International Inc. of Australia. It was also agreed that you would write to us within a week to clarify what the exact situation is."

This "without prejudice" admission relates to the temporary untraceability of Container No. 277193 which was rented by the appellant from its owner, Container Leasing Corporation, and was used to convey the goods and equipments (the subject matter of the Civil Suit) supplied to the respondent. According to the Affidavits of Mr. Malcolm D. Steinberg, as the Container was not returned to the owner or its agent, Kontena National Sdn. Bhd., or off-hired, the appellant incurred a rental expenses of US$2,272.50 and off-hiring expenses of M$5,356.28, thereby making a total of M$9,688.28. The container was off-hired by the appellant on August 3, 1977. Until that date the container was lying at the Yard of Port Klang Authority. Based on the above admission the appellant thus claimed reimbursement of the expenses incurred by it by its application for judgment under Order 32 Rule 6. The issue in respect of the appellant's application therefore relates to the respondent's liability or non-liability for the loss or untraceability of the container for which the appellant had incurred certain expenses. This issue was not raised by the appellant in his statement of claim when he commenced the suit against the respondent, although in paragraph 10 there was a claim of Australian $449.02 by way of container hire due to delay in its return to its owner because of defendant's failure to prepare the site for installation of the equipment.

In view of the issue involved in the appellant's application and the fact that the affidavits of the appellant's witnesses were challenged by the affidavit of the respondent's witness, and the purpose of the respondent's application to cross-examine the appellant's witnesses would be directed towards ascertaining the respondent's liability or otherwise, I feel that the proper way to exercise my discretion in this summons is to allow the respondent's application. Hence I ordered accordingly.

Order accordingly.

Solicitors: *Marina Yusoff & Co.; Skrine & Co.*

ADELINE LOO SOO CHAI v. MAURICE ENG CHUAN GAN

[O.C.J. (Salleh Abas F.J.) April 6, 1979]

[Kuala Lumpur — Civil Suit No. 1116 of 1978]

Practice and Procedure — Application to sign final judgment — Separation Deed — Non-payment of monthly allowance — Alleged breach of separation deed — Alleged resumption of cohabitation — Substantial defence — Triable issues — R.S.C. 1957, O. 14.

Family Law — Deed of separation — Failure to pay monthly allowances to wife — Alleged breach of separation deed by wife.

In this case the parties who are husband and wife had entered into a deed of separation, under which the husband undertook to pay a monthly allowance of $1,500 and to provide the wife with a car and the wife undertook to look after the children. At first the wife lived with the children at the matrimonial home and the monthly allowance was duly paid. Subsequently the wife moved out of the house and lived apart from the children and thereafter the husband did not pay the monthly allowance. The wife claimed the sums due for the monthly allowance. The husband alleged that the wife was in breach of the deed of separation as she had left the children to live in the house with him. He also alleged that there had been cohabitation between the parties and also that the wife had contrary to the deed of separation pledged his credit. The wife applied for leave to sign final judgment.

Held: there were triable issues in this case and the application must be dismissed.

CIVIL SUIT.

C. Vijayakumar for the plaintiff.

C.T. Khaw for the defendant.

Cur. Adv. Vult.

Salleh Abas F.J.: This is an appeal against my decision refusing the application by the appellant/plaintiff to sign a final judgment against the respondent/defendant under Order 14 Rule 1.

The appellant and the respondent are wife and husband, respectively, having been married since December 19, 1963. There were two children of the marriage, namely, Amy Gan Bee Lee, a daughter born in 1964, and Gan Seng Kuan born in 1966. Because of the differences betwen them, the parties entered into a deed of separation on September 1975, in which each of them undertook to perform certain obligations. Before the signing of the deed, the appellant was already living separately from the respondent at No. 15CX Falee Flats, Circular Road, Kuala Lumpur. After the deed was signed, in accordance with the deed she moved to stay with the children at No. 358B, Lorong 10B, United Garden, Kuala Lumpur, whilst the respondent was then away in Singapore, coming home only to this address during the weekends. The appellant stayed at this address with the children for a period of eight months beginning in September 1975 and ending in April 1976, and thereafter she went to live separately and away from the children at No. 38, Jalan Taman Seputeh. She did this because, according to her, the respondent came to live permanently at the United Garden home with the children and as she could not get along with the defendant she moved out. At the time when the appellant was living at the United Garden home, the respondent honoured the deed of separation by paying her a monthly sum of $1,500 for the children's maintenance and herself, and giving her for her use a car as required by Clause 1(b) and (c) of the deed. After she had moved out from the United Garden home to live at No. 38, Jalan Taman Seputeh, the respondent failed to pay her the monthly allowance of $1,500 and to provide her with the car.

Alleging that the respondent was in breach of the deed, the appellant sued him for the recovery of a total sum of $52,554.65, being the amount representing —

(a) the amount of children's maintenance at $1,500 per month for two years beginning April, 1976, to April, 1978; and

(b) the amount expended by her for purchasing and maintaining a car which, according to her, she

was entitled to under the deed of separation. The respondent, on the other hand, denied liability to pay her that sum and instead counterclaimed against her for a sum of $31,274.30. His defence is that his obligation to make the monthly payments and provide her with a car had since determined because he and the appellant had lived again as husband and wife in accordance with Clause 3(b) of the deed. He also alleged that the appellant herself was in breach of the deed by leaving the children to live at the United Garden home with him and thereby making him responsible for their maintenance, education, etc. which she was obliged under Clause 2(b) of the deed, and by pledging his credit on two occasions for a total sum of $906.30. Because of this breach, he therefore made a counter claim of $31,274.30.

It is in these circumstances — i.e. the appellant claiming that the respondent had committed a breach of the deed for not paying her the monthly allowances and giving her a car, whilst the respondent contending that he is no longer liable under the deed because of the fact of his cohabitation with the appellant and also because of the breach by the appellant herself — that the appellant hastened to apply for Order 14 Rule 1 to sign a final judgment against the respondent. Whether or not the appellant was entitled to the order depends on whether there is no triable issue in this case, either of facts or of law. For this purpose, it is necessary to examine the deed of separation itself.

The deed of separation was signed on September 6, 1975, the purpose for which, as can been seen from recital (e), was for "making proper arrangement for the education, welfare, maintenance and proper upbringing of the said children of the marriage." At the time when the deed was signed the respondent was living in Singapore because of his occupation there and coming home only to join the children at the weekends, whilst the appellant was living at No. 15CX Falee Flats. It must have been their concern therefore that the children whose residence is at 358, Lorong 10B, United Garden, Kuala Lumpur, should be looked after by the appellant. Thus it was agreed under Clause 1(b) and (c) that the respondent should pay the appellant $1,500 per month for the purpose of looking after the children and running the home and to provide her with a motor car. As against this obligation the appellant on her part under Clause 2(b) undertook to be responsible "for the education, welfare, maintenance and proper upbringing of the said children of the marriage and all other expenses as stated in paragraph 1(b) of the agreement;" and under Clause 2(g) undertook to "at all times stay with the children at the children's residence." Therefore, the respondent's obligation to pay the appellant a monthly sum of $1,500 and to make provision for a car to her is not an absolute right on her part at it is limited by her own obligation to be responsible for the education and the proper upbringing of the children and household expenses and to live with the children.

As long as the appellant lived with the children at their United Garden home, there was no difficulty as to the payment of these monthly allowances and the provision of a car for her. This was in fact disclosed in her own evidence that the respondent did pay these allowances and provided her with a car during the period when she was staying with the children at the United Gardens home. In this case, however, she moved out to stay away from the children in April 1976 after the respondent had come back from Singapore to live with the children permanently because she said she could not get along with the respondent. Undoubtedly, under Clause 3(c) she is entitled to do so, but the deed of separation makes no provision as to her right or the respondent's obligation regarding these monthly allowances and the provision of a car should she choose to live elsewhere away from the children's residence. The appellant seems to take a position that she is entitled to these allowances and a car in any event, irrespective of whether she is living with the children or living elsewhere away from them, because she is free to do so under the deed. This contention in effect means that her obligation to live with the children under Clause 2(g) is entirely unconnected with her undertaking to be responsible for the children's education, welfare, maintenance and upbringing, and that she is to stay with them only as long as the respondent does not live with the children. However, I cannot accept this interpretation. The appellant's contention, in my opinion, completely ignores the primary purpose of the deed of separation and the *quid pro quo* of the respondent's obligation. It is clear that as a *quid pro quo* to the obligation of the respondent to pay the allowances and to provide the appellant with a car the appellant must, firstly, be responsible for the children's education, welfare, maintenance and upbringing and, secondly, in order to facilitate her to discharge this responsibility has to live with the children at the children's residence. Only when the deed is thus interpreted will the objective stated in recital (e) of the deed be achieved. This recital says: "The parties are desirous of making proper arrangements for the education, welfare, maintenance and proper upbringing of the said children of the said marriage." Undoubtedly in this case the appellant is entitled to live elsewhere, but where she does so, not only does the deed make no provision as to her responsibility for the children's education, welfare, maintenance and upbringing and as to the respondent's obligation to pay these monthly allowances and make provision for a car, but also the very fact of her living away from the children, in my judgment, makes it difficult, if not impossible, for her to be so responsible for or to discharge her responsibility towards the children. In this case, since the respondent has been assuming responsibility for the children's education, welfare, maintenance and upbringing ever since she left them in April 1976, I cannot see how the appellant would still be entitled to monthly payment of allowances and the provision of a car, especially where the custody has been agreed to by the parties under Clause 2(c) to be with the father (respondent). I see no merits in the appellant's argument. I hold that the deed was entered into by the parties for the education, welfare, maintenance and upbringing of the children and that in order to achieve this objective the following provisions are made: (a) the custody is to be with the respondent; (b) the children are to live at the United Gardens home; (c) the appellant is to look after the children and to run their home; (d) the appellant is to live with the children

except when the respondent comes to live permanently with the children; and (e) the respondent had to pay the appellant a monthly allowance of $1,500 and to provide her with the car for the purpose of the children's education and well-being. Thus if she decides to live elsewhere, even though she is free to do so under the agreement, she has in fact and law discharged herself from the obligation to look after the children, and that being the case, there is no reason either in law or in equity why she should still be entitled to those allowances and a car, the benefits of which are meant obviously for the children. She turns round and says that she is not in a position to discharge her responsibility towards the children because the respondent has failed to pay her the allowances and to provide her with a car. The answers to this argument, as I have stated earlier, is that not only does the deed make no provision in the event the appellant lives apart from the children, but the very fact of her living away from them and the assumption of responsibility by the respondent towards the children is contrary to the purpose and spirit of the agreement and militates towards her ability to discharge her undertaking towards the children.

Further, the defence set up by the respondent is that during those weekends in the period between September 1975 and April 1976 when he came home from Singapore to stay with the children, he and the appellant co-habited as husband and wife, and therefore this liability for which the appellant sued him by virtue of Clause 3(b) had ceased to exist. The question whether the party co-habited or not is a question of fact. There is only the oral evidence of the appellant to the effect that at no time had she co-habited with the respondent. However, there are circumstances disclosed in the cross-examination which would lead to an inference or finding of facts, if a trial is held, that the parties had resumed co-habitation. As this is not a trial, I had no opportunity to hear the evidence of the respondent in support of his defence. Therefore, whether or not the respondent was liable to pay the sums claimed depends on the proof as to his co-habiting or not co-habiting with his wife.

The respondent also alleged that the appellant had committed a breach of the agreement for pledging the credit of the respondent contrary to Clause 2(a) of the deed, thereby causing him to incur certain expenses amounting to $906.30 for which the appellant in breach of the deed failed to indemnify him. This allegation has not been controverted by the appellant apart from the counsel's statement from the bar that he had no knowledge of it.

To my mind, the defences put up by the respondent both in law and facts are by no means sham or immaterial. They are substantial and even demolish the very case of the appellant itself, and if I may say so, they reduce the appellant's case to a sham one. I therefore hold that there are triable issues and as such I dismissed the appellant's application for Order 14 rule 1.

Application dismissed.

Solicitors: *James Foong & Co.; Allen & Gledhill.*

MOHAMED NOH BIN YAAKOB & ANOR. v. HAJI MOHAMED NOOR BIN HAJI YAKUB

[A.C.J. (Syed Agil Barakbah J.) March 5 & May 13, 1979]
[Alor Star — Civil Appeal No. 5 of 1978]

Practice and Procedure — Jurisdiction — Judgment in default — Whether President of Sessions Court could set aside Judgment in default made by his predecessor — Subordinate Court Rules 1950, O. II, O. XIX r. 3(3), O. XXXVI r. 19 — R.S.C. 1957, O. 13 r. 10, O. 27 r. 15, O. 36 r. 33.

This is an appeal against the decision of the learned President, Sessions Court on a point of law which he decided that he had no jurisdiction to set aside judgment in default made by his predecessor against the appellants for failing to appear during the proceeding. In the lower court, the appellants contended that they knew about the case only when a judgment notice was served on them.

Held: (1) no President or Magistrate can set aside a final judgment unless allowed by statute. The only remedy is to file an appeal against judgment;

(2) in the present case where the judgment entered against the defendant was in default of him being present in court during the hearing, by virtue of Order XIX rule 3(3) and Order XXXVI rule 19 of the Subordinate Courts Rules, the succeeding President or Magistrate might hear and if satisfied on the merits of the application, set aside the judgment of the predecessor.

Cases referred to:-

(1) *Nacheeppia Chettiar* v. *Gan Eng Kiat* [1965] 2 M.L.J. 25.

(2) *Arjan Singh* v. *Hashim Angullia & Ors.* [1941] M.L.J. 55.

(3) *L.W. Cyris* v. *K.G.A. Gunadasa* [1955] M.L.J. 7.

CIVIL APPEAL.

A. Jayadeva for the appellants.

Kartar Singh for the respondent.

Cur. Adv. Vult.

Syed Agil Barakbah J.: This is an appeal against the decision of the learned President, Sessions Court, Alor Star, on a point of law which he raised as a preliminary issue and decided that he has no jurisdiction to set aside the judgment in default made by his predecessor against the appellants for failing to appear during the proceeding. The judgment given against the appellants (defendants in the court below) was for the surrender forthwith of vacant possession of certain land on the ground that they were trespassers and for payment of damages in the sum of $2,305 and costs. The order was issued on January 10, 1976. On August 16, 1977, the appellants filed the application to set as.de the said judgment. The accompanying affidavit, *inter alia,* states that the summons was not served on the appellants. All that they knew about the case was when a judgment notice was served on them on or about July, 1977.

The judgment in default was made by the former President, Encik Haidar. When he went on transfer the present President, Encik Yusof Khan succeeded him. He held that he has no jurisdiction to hear the application. He relied on the judgment of Suffian J., (as he then was) in *Nacheeppia Chettiar* v. *Gan Eng Kiat.*[1] It was held that a President of a Sessions Court has no power to set aside the judgment of his predecessor.

A number of authorities were cited before the learned President who concluded that the facts in the